

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLENE ANN POTTER
Claimant

VS.

CASEY'S GENERAL STORES
Respondent

AND

EMPLOYERS MUTUAL CASUALTY CO.
Insurance Carrier

Docket No. 1,016,903

ORDER

Respondent and its insurance carrier request review of the December 8, 2004 preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered accidental injury arising out of and in the course of employment which aggravated a preexisting condition in her left hand and injured her right hand. The ALJ further determined claimant gave respondent timely notice of the accident.

The respondent appealed and in its brief argues claimant did not suffer accidental injury arising out of and in the course of her employment. Respondent further argues that if claimant suffered a compensable claim the ALJ erred in awarding temporary total disability benefits. Lastly, in its application for review the respondent raised the issue whether claimant provided timely notice.

Conversely, claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed in November 1999 as a cook/cashier for respondent. She would start work at 4:30 a.m. and would warm donuts and other pastries then put them on trays in the display case as well as cook breakfast sandwiches and pizzas. Claimant would also wash dishes and clean the kitchen. At 8 a.m., claimant would stop work and then return at 10 a.m. to prepare items for lunch. Claimant would also stock the coolers as well as work the cash register as she continued working.

In December 2003 claimant was lifting a tray of donuts when she heard a popping noise in her wrist and experienced immediate pain up into her left arm. Claimant reported the incident to the acting manager. Claimant testified she told various supervisors about the difficulties she was experiencing with her hands and wrists.

Claimant had sought treatment from her personal physician and eventually was provided restrictions to reduce her work activity. When claimant provided the restrictions to her supervisor she was allowed to reduce her work. Nonetheless, claimant was later taken off work and while she was off work there was a change in managers at the store where she worked. When claimant was provided a release to light-duty work in March 2004, she took the restrictions to the new store manager and was told to provide more specific restrictions. The claimant obtained more specific restrictions but they were still questioned by the store manager and then claimant was again taken off work by her doctor.

Because the issue of her restrictions could not be resolved the claimant resigned. After claimant left work with respondent she worked two days running a register at a McDonald's restaurant but was unable to do the job because of her hands. They would go to sleep and she dropped items.

Claimant had problems with her left hand and wrist before she began working for respondent but testified her condition in her left hand worsened as she worked for respondent and she developed problems in her right hand as well. She further testified the condition of her hands stayed the same when she worked the two days for McDonald's restaurant.

Although not briefed, in its application for review, the respondent raised the issue whether claimant had provided timely notice. The claimant's testimony that she told several specific supervisors about her shoulder, hand and wrist problems was uncontradicted. Uncontroverted evidence that is not improbable or unreasonable cannot

be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.¹ The Board affirms the ALJ's finding the claimant provided timely notice.

It was undisputed that claimant had preexisting problems in her left hand. But she testified that as she performed her repetitive work activities for the respondent the condition in her left hand worsened and she began to develop the same problems with her right hand. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.²

Although respondent argued claimant suffered additional injury after she left employment with respondent, the claimant noted she only worked two days before she had to quit because of persistent hand problems. Moreover, claimant testified the condition in her hands was not worsened by her two days of attempted employment.

The ALJ concluded the claimant suffered accidental injury arising out of and in the course of her employment. The ALJ specifically noted the claimant aggravated a preexisting condition in her left hand and injured her right hand. The Board agrees and affirms.

Finally, respondent argues the ALJ erred in awarding claimant temporary total disability benefits. Whether the ALJ should, in a given set of circumstances, authorize temporary total disability compensation is not a question that goes to the jurisdiction of the ALJ. K.S.A. 44-534a, as amended, specifically grants an ALJ the authority to decide at a preliminary hearing issues concerning the payment of temporary total disability compensation. Therefore, the ALJ did not exceed his jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2), as amended. That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Brad E. Avery dated December 8, 2004, is affirmed.

¹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

² *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

IT IS SO ORDERED.

Dated this 28th day of February 2005.

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director